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7 LENSCRAFTERS, INC. and EYEXAM OF
8 CALIFORNIA, INC.

9
10 IN THE UNITED STATES DISTRICT COURT
11
12 NORTHERN DISTRICT OF CALIFORNIA

13 LENSCRAFTERS, INC. and EYEXAM OF
14 CALIFORNIA, INC.,

15 Plaintiffs,

16 v.
17 LIBERTY MUTUAL FIRE INSURANCE
18 COMPANY; EXECUTIVE RISK SPECIALTY
19 INSURANCE COMPANY; UNITED STATES
FIRE INSURANCE COMPANY; MARKEL
AMERICAN INSURANCE COMPANY and
WESTCHESTER FIRE INSURANCE COMPANY,

20 Defendants,

21 AND RELATED COUNTER- AND CROSS-
22 CLAIMS.

23 Case No.: C-07-2853 SBA

24
**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR LEAVE TO FILE
FIRST AMENDED COMPLAINT**

25 Date: October 2, 2007
Time: 1:00 p.m.
Courtroom: 3
The Hon. Saundra Brown Armstrong

NOTICE OF MOTION

2 PLEASE TAKE NOTICE that on October 2, 2007, at 1:00 p.m., in Courtroom 3 of the
3 United States District Court, Northern District of California, located at 1301 Clay Street, 3rd Floor,
4 Oakland, California, Plaintiffs LensCrafters, Inc. and EYEXAM of California, Inc. (together,
5 "LensCrafters") will and do move pursuant to Fed. Rule Civ. Pro. Rule 15 for leave to file a First
6 Amended Complaint in this action, a proposed copy of which is attached as Exhibit 1 to this
7 motion. Specifically, LensCrafters seeks to amend the existing complaint to add claims for breach
8 of contract against all defendants and breach of the covenant of good faith and fair dealing against
9 defendants United States Fire Insurance Company ("U.S. Fire"), Markel American Insurance
10 Company ("Markel") and Westchester Fire Insurance Company ("Westchester"). This motion is
11 made on the grounds that recent events have given rise to additional claims that should be brought
12 in this action, that the amendment is necessary to promote the interests of justice and efficiency and
13 that defendants will not be prejudiced by the amendment. The motion is based on the memorandum
14 of points and authorities filed herewith, the Declaration of Celia M. Jackson accompanying this
15 motion, the pleadings and papers in this action, and on any argument to be made at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

18 Pursuant to Federal Rule of Civil Procedure 15(a), plaintiffs LensCrafters, Inc. and
19 EYEXAM of California, Inc. (together, “LensCrafters”) respectfully request that the Court issue an
20 order granting LensCrafters leave to file a First Amended Complaint. LensCrafters seeks to add
21 additional claims against defendants (“Insurers”) for breach of the same insurance contracts
22 identified in the current complaint, and as to certain Insurers, for breach of the covenant of good
23 faith and fair dealing. The proposed amendment involves no new parties or insurance contracts.
24 Rather, LensCrafters simply seeks leave to amend so that all claims related to Insurers’ duty to
25 indemnify and duty to settle can be adjudicated together in this action.¹

²⁷ ¹ A copy of the proposed amended complaint is attached as Exhibit 1 to this motion and was
²⁸ provided to Insurers before LensCrafters filed this motion. See Declaration of Celia M. Jackson in
Support of Motion for Leave To File Amended Complaint (“Jackson Dec.”), ¶ 2.

1 While the new claims that LensCrafters seeks to add are closely related to the claim in the
 2 current complaint, these new claims were not ripe before July 26, 2007 and could not have been
 3 added until then. This lawsuit involves a dispute between LensCrafters and Insurers regarding
 4 indemnity coverage for a purported class action lawsuit entitled *Melvin Gene Snow, et al. v.*
 5 *LensCrafters, Inc., et al.*, San Francisco Superior Court Case No. CGC-02-40554 (the “*Snow*
 6 Action”). At the time LensCrafters filed its complaint, LensCrafters was trying to negotiate a
 7 settlement of the *Snow* Action and it had become apparent that Insurers’ positions regarding
 8 insurance coverage and allocation were major obstacles. Thus, LensCrafters filed its complaint
 9 alleging a single claim for declaratory relief.

10 Since then, however, facts have changed: LensCrafters and the *Snow* plaintiffs have
 11 negotiated a reasonable settlement, contingent on consent and funding by Insurers. At a mediation
 12 on July 26, 2007, Insurers refused to accept the settlement. At that point, they breached their
 13 obligations under the insurance contracts.

14 Based on these recent developments, LensCrafters seeks to amend its complaint to add the
 15 claims for breach of contract and tortious breach of the covenant of good faith and fair dealing —
 16 claims that were unripe before July 26. This amendment will not prejudice Insurers, as this
 17 litigation is still in its earliest stages. Nor should this amendment come as a surprise to any Insurer,
 18 because LensCrafters told them that their failure to accept the *Snow* settlement would amount to a
 19 breach of contract and warned them nearly one month ago that it might file breach of contract
 20 claims.

21 **II. STATEMENT OF FACTS**

22 **A. The *Snow* Action**

23 In March 2002, plaintiffs in the *Snow* Action filed a purported class action lawsuit in the
 24 San Francisco Superior Court against LensCrafters. Plaintiffs’ complaint arises from a “co-
 25 location” model used by LensCrafters, Inc. and EYEXAM of California, Inc. (“EYEXAM”) in
 26 more than 90 stores located in California. Plaintiffs seek to certify a California-only class of
 27 consumers who had their eyes examined by an California-licensed optometrist employed by
 28 EYEXAM and then purchased eyewear from LensCrafters on the same day. Jackson Dec., Ex. 1.

The number of purported class members is estimated to be more than 1 million. *Id.*, ¶ 4. Plaintiffs claim, among other things, that LensCrafters disclosed their confidential medical information in violation of the California Confidentiality of Medical Information Act, Cal. Civ. Code § 56 *et seq.*

B. The Prior California Coverage Litigation

In March 2004, LensCrafters filed an action for declaratory relief and breach of contract against one Insurer, Liberty Mutual Fire Insurance Company (“Liberty”); LensCrafters later amended that complaint to add another Insurer, Executive Risk Specialty Insurance Company (“ERSIC”). In that lawsuit (the “Prior California Action”) this Court found that Liberty and ERSIC both have a duty to defend LensCrafters for the claims asserted in the *Snow* Action. Judgments were entered in that action in November 2005 and are currently on appeal to the Ninth Circuit.

In the Prior California Action, LensCrafters had also alleged claims related to the duty to indemnify. On June 21, 2005, the parties stipulated and the Court ordered that the indemnity claims in the Prior California Action would be dismissed because they were not ripe for adjudication at that time. The stipulated order provided that any party could re-file the dismissed indemnity claims, but such action had to be filed in the Federal District Court for the Northern District of California. *See* Jackson Dec., ¶ 5 & Ex. 2.

C. The Events Leading To Insurers' Breach of the Insurance Contracts

The *Snow* Action has been actively litigated for several years. Earlier this year, the parties began serious settlement discussions. Jackson Dec., ¶ 7. On April 27, 2007, the parties in *Snow* — along with Liberty, U.S. Fire and the other Insurers — attended a mediation at which significant progress was made towards settlement. Negotiations continued following this mediation session, and LensCrafters kept Insurers apprised of developments. *Id.* By May it had become apparent that Insurers' positions on certain insurance issues — such as whether the *Snow* claims are covered, whether Insurers had a duty to fund a settlement, and how settlement funding should be allocated among Insurers — represented a major obstacle to settlement. *Id.* To resolve these issues, on May 31, 2007, LensCrafters filed this action for declaratory relief.²

² In addition, on May 24, 2007, U.S. Fire filed a preemptive suit against LensCrafters and the other Insurers (except for ERSIC) in New York, in which U.S. Fire alleged alleging that its

1 Then in June, LensCrafters reached a settlement with the *Snow* plaintiffs, contingent on
 2 approval and funding by Insurers. LensCrafters asked Insurers to accept the settlement, which was
 3 reasonable in terms of LensCrafters' exposure in the *Snow* Action and was within the limits of
 4 Insurers' policies. *Id.*, ¶ 9. A further mediation session was scheduled for July 26, 2007 to finalize
 5 the settlement, and Superior Court Judge Richard Kramer, who is handling the *Snow* Action, issued
 6 an order requiring the parties and Insurers to attend. *Id.* This mediation, however, was
 7 unsuccessful. Insurers refused to accept and fund the *Snow* settlement, thereby breaching their
 8 insurance contracts.³

9 **D. LensCrafters' Current Complaint and the Proposed Amendment**

10 LensCrafters filed its original complaint in this action on May 31, 2007. On June 15, 2007,
 11 the Court deemed this action to be a "related case" to the Prior Coverage Action.

12 The original complaint included only a single claim for declaratory relief related to Insurers'
 13 duty to indemnify LensCrafters for the *Snow* claims. But all parties should have understood that
 14 LensCrafters might file breach of contract claims should Insurers breach their duty to indemnify or
 15 their duty to settle. With Insurers' refusal to accept and fund the *Snow* settlement at the July 26
 16 mediation, those claims have now become ripe.

17 Consequently, LensCrafters' proposed amendment adds a claim for breach of contract
 18 against all Insurers, based on their breach of the duty to settle the *Snow* Action. The proposed
 19 amendment also adds a claim for tortious breach of the covenant of good faith and fair dealing
 20 against U.S. Fire, Markel and Westchester. In addition to these new claims, the proposed amended
 21 complaint includes new allegations describing facts that have occurred since July 26, and makes
 22 other changes to reflect the recent factual developments and the new claims. No new parties have
 23 been added, however, and the insurance policies cited are the same as those included in
 24 LensCrafters' original complaint. *See* Jackson Dec., ¶ 2 and Exhibit 1 to this Motion.

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 27 insurance policies did not provide coverage for the *Snow* claims and sought a judicial declaration
 28 that it did not have to contribute to any settlement. Jackson Dec., ¶ 8.

³ In fact, U.S. Fire violated the Superior Court's order by refusing to attend the July 26
 mediation. Jackson Dec., ¶ 9.

1 **III. THE COURT SHOULD GRANT LENSCRAFTERS' REQUEST TO FILE A FIRST
2 AMENDED COMPLAINT**

3 **A. The Federal Rules of Civil Procedure Allow Liberal Amendment of Pleadings**

4 Federal Rule of Civil Procedure 15(a) states that leave to amend “shall be freely given when
5 justice so requires.” The Federal Rules of Civil Procedure favor the efficient use of judicial
6 resources and the resolution of claims on the merits. *See Foman v. Davis*, 371 U.S. 178, 181-82
7 (1962); *see also Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987). Therefore, leave to amend
8 a complaint should be granted with “extreme liberality.” *United States v. Webb*, 655 F.2d 977, 979
9 (9th Cir. 1981); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

10 Although the decision to grant leave to amend is within a court’s discretion, leave to amend
11 should be freely granted and should be denied only when there is compelling reason to do so. *See*
12 *DCD Programs*, 833 F.2d at 190. Accordingly, a court should not deny leave to amend unless one
13 of the following factors, set forth in the Supreme Court’s decision in *Foman*, is present: (1)
14 prejudice to the opposing party, (2) undue delay, (3) futility of the amendment, or (4) bad faith.
15 *See, e.g., Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999); *Eminence Capital,*
16 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Of these factors, prejudice to the
17 opposing party is the most critical. *Eminence*, 316 F.3d at 1052. Indeed, “[a]bsent prejudice, or a
18 strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a)
19 in favor of granting leave to amend.” *Id.*⁴ Here, none of the *Foman* factors preclude LensCrafters
20 from amending its complaint.

21 **B. LensCrafters’ Claims for Breach of Contract and Breach of the Covenant of
22 Good Faith Should Be Heard Together with Its Claim for Declaratory Relief**

23 The amendments proposed by LensCrafters will serve to promote justice and judicial

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25 ⁴ Prejudice may be shown, for example, where an amendment would reopen discovery,
26 would not permit the opposing party adequate time to conduct discovery, or would *unduly* delay
27 the litigation. *See, e.g., Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 985-986
28 (1999) (motion to amend denied when motion made three months after stipulated time to make such
amendments and amendment would result in need to reopen discovery and therefore delay the
proceedings); *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1087 (2002) (motion to amend
denied because it was filed several days before the discovery cutoff and less than three months
before trial).

1 efficiency. The proposed claims are closely related to the claim previously alleged, and arise out of
 2 the same insurance policies issued by the same Insurers. Like the current claim for declaratory
 3 relief, the proposed additional claims relate to Insurers' duty to indemnify LensCrafters and their
 4 duty to settle the claims in the *Snow* Action. Now that Insurers have breached their contractual
 5 duties by refusing to accept the settlement, LensCrafters should be permitted to assert claims for
 6 breach of contract and tortious breach of the covenant of good faith and fair dealing. All these
 7 claims should be heard a single action, in order to prevent multiple litigation concerning the same
 8 issues.

C. The Amendment is Timely and Will Result in No Prejudice to Defendants

10 There can be no question that LensCrafters has acted promptly and diligently in seeking
 11 leave to amend the complaint. It was not until July 26 — less than two weeks ago — that Insurers
 12 breached their contractual obligations. If LensCrafters had asserted the new claims in its original
 13 complaint, or sought leave to allege them before July 26, one or more Insurers would likely have
 14 objected to the claims as premature or unripe.

15 Because LensCrafters has acted so promptly in seeking leave to amend, and because this
 16 litigation is in its earliest stages, no Insurer will be prejudiced by the amendment. Some Insurers
 17 have not even responded to the original complaint. Discovery has not commenced, and the parties'
 18 initial disclosures under Rule 26 are not due until September 5. Given the absence of prejudice or
 19 delay, the Court should grant this motion.

**D. U.S. Fire's Pending Motion to Dismiss Is Not Grounds for Denying
 LensCrafters' Motion**

20 One Insurer — U.S. Fire — has told us that it objects to the proposed amendment because it
 21 might delay resolution of a motion it has filed to dismiss the original complaint. Jackson Dec., ¶ 10
 22 & Ex. 3. In that motion, U.S. Fire argues that this Court should decline to exercise jurisdiction over
 23 the declaratory relief claim asserted in LensCrafters' original complaint in light of the lawsuit U.S.
 24 Fire has filed in New York.⁵

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 27 ⁵ U.S. Fire has used its preemptive New York filing to argue that this California action
 28 should not proceed. LensCrafters believes that issues related to Insurers' duty to indemnify should
 be heard here in this Court, based on the prior coverage litigation and the overwhelming contacts

1 A pending motion to dismiss does not provide grounds to deny a motion to amend. Indeed,
 2 LensCrafters could amend its complaint to assert new claims against U.S. Fire as a matter of right,
 3 because U.S. Fire has not filed a responsive pleading. *Doe v. United States*, 58 F.3d 494, 497 (9th
 4 Cir. 1995) (a motion to dismiss is not a responsive pleading within the meaning of Rule 15(a));
 5 *Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198, 1201 (2003)
 6 (same).⁶ Moreover, it should come as no surprise to U.S. Fire that LensCrafters is seeking leave to
 7 amend to add breach of contract claims. Those claims are the logical outcome of U.S. Fire's
 8 decision to breach its duty to settle the *Snow* case, and LensCrafters had warned U.S. Fire that it
 9 might file such claims.⁷ U.S. Fire cannot claim that it is dilatory or improper for LensCrafters to
 10 assert these claims, when U.S. Fire's own conduct subsequent to the filing of the original complaint
 11 made those claims necessary.

12 Despite whatever protests U.S. Fire may make in opposing this motion, the reality is that
 13 between the time that LensCrafters filed its original complaint and now circumstances have
 14 changed. When LensCrafters filed its complaint, Insurers had not yet refused to accept a
 15 settlement. They did so as of July 26, thereby breaching their duties under the insurance policies.
 16 By this motion, LensCrafters seeks to have all claims related to the remaining coverage issues heard
 17 together in this action. This is the proper way to proceed, and the interests of justice and judicial
 18 economy will be served by permitting LensCrafters to amend its complaint.

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 23 between this case and California. As explained above, this action seeks insurance coverage for
 24 claims brought by a California-only class of one million consumers who made purchases at
 25 LensCrafters stores in California and allege violations of three California statutes. For these reason,
 26 LensCrafters has asked the New York Court to dismiss or stay the U.S. Fire lawsuit, and the Court
 27 has set a briefing schedule with a hearing date of October 29, 2007. Jackson Dec., ¶ 8.

28 ⁶ “[Fed.R.Civ.P.] Rule 7(a) defines ‘pleadings’ as a complaint and answer; a reply to a
 29 counterclaim; an answer to a cross-claim; and a third party complaint and answer. Anything else is
 30 a motion or paper.” *Morrison v. Mahoney*, 399 F.3d 1042, 1046 (9th Cir. 2004).

⁷ See Jackson Dec., ¶ 11 & Ex. 4.

IV. CONCLUSION

For the reasons stated above, the Court should grant LensCrafters leave to file a first amended complaint in the form attached hereto as Exhibit 1.

DATED: August 6, 2007

Respectfully submitted,

HELLER EHRLMAN LLP

By /s/ Celia M. Jackson
Celia M. Jackson

Attorneys for Plaintiffs
LENSCRAFTERS, INC. and EYEXAM OF
CALIFORNIA, INC.